

Spaight



Comptroller General
of the United States

Washington, D.C. 20548

144731

Decision

Matter of: Department of Interior--Disposition of Liquidated Damages Collected for Delayed Performance

File: B-242274

Date: August 27, 1991

DIGEST

The Minerals Management Service, Department of the Interior, may not use liquidated damages recovered under a computer conversion contract to pay for increased costs it incurred under other computer contracts in a subsequent fiscal year.

DECISION

An official of the Minerals Management Service, Department of the Interior, requests our opinion concerning the proper use of funds received as liquidated damages. In fiscal year 1986, the Service collected \$979,498.80 in liquidated damages as the result of a contractor's delayed performance under a fiscal year 1985 contract. Because of the contractor's delay, the Service incurred increased costs under two fiscal year 1987 contracts. The official asks whether the Service may use the funds collected as liquidated damages to cover the increased costs incurred under the two fiscal year 1987 contracts. For the following reasons, we conclude that the Service may not use the funds to pay for such costs.

BACKGROUND

In fiscal year 1985, the Service awarded a contract to Martin Marietta Data Systems to convert three of the Service's accounting systems from VAX computers to an IBM mainframe computer. Martin Marietta failed to convert the accounting systems to the IBM computer by the required completion date. Therefore, as provided in the contract, the Service assessed liquidated damages against Martin Marietta for each day of delay up to the maximum 180 days. The Service collected damages totaling \$979,498.80 in fiscal year 1986 and credited the amount to its fiscal year 1985 appropriation.

In fiscal year 1987, as a result of the delay, the Service was required to extend performance under an existing contract to continue the operation and maintenance of the accounting systems using the VAX computers. The delay also resulted in additional data entry and associated work under a second fiscal year 1987 contract.

Based on a determination by DOI's Office of the Solicitor, the Service obligated the liquidated damages that had been credited to the fiscal year 1985 appropriation to pay the increased costs incurred under these contracts.

Discussion

Generally, money received by and for the use of the government must be deposited into the Treasury as miscellaneous receipts. See 62 Comp. Gen. 678, 679 (1983); 31 U.S.C. § 3302. An agency may, however, deposit receipts that constitute refunds, including amounts collected as liquidated damages, to the credit of the appropriation or fund charged with the original expenditure. See 64 Comp. Gen. 625, 627 (1985); 62 Comp. Gen. at 680.

An agency may retain liquidated damages in the appropriation account originally charged with the contract rather than deposit them in the Treasury as miscellaneous receipts for two reasons. One, they effect an authorized reduction in the price of the individual contract concerned and, two, retaining the funds in the appropriation originally charged makes them available for return to the contractor if it is subsequently relieved of liability. 64 Comp. Gen. at 626.

In any case, an agency may only credit the funds to the appropriation charged with the contract that resulted in the liquidated damages. As such, the funds are only available to fund contracts properly chargeable to the original appropriation. 31 U.S.C. § 1502. Here, the liquidated damages were properly credited to the agency's fiscal year 1985 appropriation. Thus, the funds were available to meet the agency's fiscal year 1985 needs, including, if necessary, a replacement contract. See 62 Comp. Gen. 678.

A replacement contract is a new contract the agency enters into to satisfy a continuing bona fide need for the goods or services covered by the original contract. 55 Comp. Gen. 1351, 1353 (1976). Such a contract must be of substantially the same size and scope as the original contract and should be executed "without undue delay" after the original contract is terminated. 60 Comp. Gen. 591, 595 (1981).

The Service's contract with Martin Marietta was for the conversion of the agency's accounting systems from one computer system to another. The contracts funded with the liquidated damages, on the other hand, related to the continued operation and maintenance of the accounting systems under the old VAX computer system in fiscal year 1987 under contracts made in that year. Therefore, these contracts did

not satisfy a continuing need for the goods and services which were provided under the original fiscal year 1985 Martin Marietta contract. See 60 Comp. Gen. 591, 594 (1981).

In this context, therefore, the two fiscal year 1987 contracts were not "replacement" contracts. It follows that the liquidated damages were not available to pay for increased costs incurred under these contracts. The services provided in fiscal year 1987 were properly chargeable to the agency's fiscal year 1987 appropriations. See B-207433, Sept. 16, 1983.

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